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**IN THE
COURT OF APPEALS OF INDIANA**

CARMELO GONZALEZ, JR.,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 45A03-0606-CR-253

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Ross Boswell, Judge
Cause No. 45G03-0404-FB-34

February 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Carmelo Gonzalez appeals his sentence after pleading guilty to Sexual Battery, as a Class D felony. He presents a single issue for review, namely, whether the trial court erred when it identified his subsequent criminal activity and probation violation as aggravating circumstances in support of an enhanced sentence.

We affirm.

FACTS AND PROCEDURAL HISTORY

In 2001, Gonzalez was a neighbor of D.K., a six-year-old boy. Between July and September 2001, Gonzalez twice invited D.K. to his house, where he restrained D.K., pulled down D.K.'s pants, and inserted a thermometer into D.K.'s rectal area. As a result, on April 30, 2004, the State charged Gonzalez by information with one count each of Criminal Deviate Conduct, as a Class B felony; Child Molesting, as a Class B felony; and Child Molesting, as a Class C felony. On March 2, 2006, the parties filed a stipulated plea agreement, as a result of which Gonzalez pleaded guilty to an amended information charging sexual battery, as a Class D felony. The plea agreement left sentencing to the discretion of the trial court.

On April 28 and May 11, 2006, the trial court held a sentencing hearing. On May 12, 2006, the trial court issued its well-organized sentencing order, which provides, in relevant part:

Cause submitted for acceptance of plea and sentencing hearing. The Court now accepts said plea agreement and finds the defendant guilty of the amended charge of Sexual Battery, Class D felony. The Court having reviewed the pre-sentence investigation report and the parties offering no objections, accepts same of record. Evidence presented. Arguments of counsel heard.

Having considered the written pre-sentence investigation report, as well as I.C. 35-38-1-7.1, the Court now enters the following findings and sentence:

Mandatory Consideration:

1. The victim was less than 12 years of age.

Mitigating Circumstance:

1. The defendant has pled guilty and has admitted guilt.

Aggravating Circumstance:

1. The defendant has a history of criminal activity as previously stated.
2. The victim was 12 years of age or younger.
3. The defendant has previously violated probation, and the Court feels that the defendant is not a candidate for probation at this time.

The Court finds that the aggravating circumstances outweigh the mitigating factors.

Cause submitted for SENTENCING. After considering the above along with the pre-sentence investigation report, the Court now finds the defendant guilty of the amended charge of Sexual Battery, a Class D Felony, and sentences the defendant to two (2) years in the Indiana Department of Correction.

Appellant's App. at 33-34. Gonzalez appeals.

DISCUSSION AND DECISION

Gonzalez contends that the trial court abused its discretion when it identified aggravators to support the enhancement of his sentence. We review a trial court's sentencing decisions for an abuse of discretion.¹ Plummer v. State, 851 N.E.2d 387, 390 (Ind. Ct. App. 2006). When the trial court imposes an enhanced sentence, it must state

¹ The sentencing statutes were amended in April 2005 to provide for an advisory sentence within a range. Gonzalez committed the instant offenses between July and September, 2001. The law that was in effect at the time of the commission of the crime controls the resolution of sentencing issues. Peace v. State, 736 N.E.2d 1261, 1267 (Ind. Ct. App. 2000), trans. denied. Therefore, we analyze the sentencing issues using the presumptive sentencing scheme in effect in 2001.

the reasons underlying the sentencing decision. Ind. Code § 35-38-1-3; Edwards v. State, 842 N.E.2d 849, 854 (Ind. Ct. App. 2006). The trial court's statement of reasons must include the following components: (1) identification of all significant aggravating and mitigating circumstances; (2) the specific facts and reasons that led the court to find the existence of each such circumstance; and (3) an articulation demonstrating that the mitigating and aggravating circumstances were evaluated and balanced in determining the sentence. Edwards, 842 N.E.2d at 854.

Gonzalez contends that the trial court erred when it identified his criminal history and his probation violation as aggravating circumstances. Specifically, he contends that the offense for which he was being sentenced occurred before the convictions and the probation violation relied upon by the trial court to support the enhanced sentence. However, in his brief Gonzalez does not cite to the record to demonstrate the dates of the convictions or probation violation. As such, he provides no citations in support of his contention that the criminal history and probation violation occurred after the instant offense, nor does he cite to any case law in support of his assertion that his criminal history and probation violations must have occurred before the instant offense in order to be valid as aggravators. Thus, Gonzalez has waived the argument for appellate review. See Ind. Appellate Rule 46(A)(8)(a).

Waiver notwithstanding, his argument fails. If the trial court had erred when it considered Gonzalez' subsequent criminal activity, the remaining aggravating circumstances support the enhancement of Gonzalez' sentence. Gonzalez does not contest the validity of the trial court's finding that the age of the victim was an

aggravator. Indeed, that the victim was less than twelve years old at the time of the offense was a mandatory consideration. See Ind. Code § 35-38-1-7.1(a)(4) (2001). And the sentencing statute specifically allowed the court to consider as an aggravator that Gonzalez has “recently violated the conditions of any probation” See Ind. Code § 35-38-1-7.1(b)(1) (2001). The record shows that Gonzalez was unsatisfactorily discharged from probation in 2003, and, as a result, the trial court listed that as an aggravator, noting that Gonzalez was “not a candidate for probation” at that time. Appellant’s App. at 33.

When a court has relied on valid and invalid aggravators, the standard of review is whether we can say with confidence that, after balancing the valid aggravators and mitigators, the sentence enhancement should be affirmed. See Trusley v. State, 829 N.E.2d 923, 927 (Ind. 2005) (where the court balanced the valid aggravators and mitigators and stated “with confidence” that Trusley’s sentence enhancement should be affirmed). Here, in light of the age of the victim and Gonzalez’ probation violation, we cannot say that the trial court abused its discretion when it enhanced Gonzalez’ sentence by six months.

Affirmed.

MAY, J., and MATHIAS, J., concur.